

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SUBREGION 33

LANDES TRUCKING, INC.

Employer¹

and

Case 33-RC-5073

CHAUFFEURS TEAMSTERS & HELPERS
LOCAL UNION NO. 26

Petitioner²

REGIONAL DIRECTOR'S
DECISION AND ORDER

The Employer is a regional tank truck carrier that hauls liquid food grade oils from its two terminals in Jacksonville and Champaign, Illinois. Petitioner filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act seeking to represent a unit of tank washers employed at the Employer's Champaign, Illinois facility. A hearing officer of the Board held a hearing and the parties filed briefs.

As evidenced at the hearing and on brief, the parties disagree on whether the layoff of the tank wash employees, as a result of subcontracting, is imminent and certain. The Employer contends that the petition should be dismissed because the Employer has an agreement with Express Personnel Services, a temporary agency located in Champaign, to supply all of the tank washers at the Employer's two facilities, with this transition to be accomplished by late February 2008. The Union contends that dismissal is not warranted because the subcontracting

¹ The Employer's name appears as amended at hearing.

² The Petitioner's name appears as amended at hearing.

of the Champaign tank wash operations is purely speculative and dependent upon facts uncertain at this time.³

The parties do not appear to contest that a unit of the Employer's tank washers at its Champaign, Illinois facility would be appropriate for purposes of collective bargaining. There are currently six employees in the unit. I have considered the evidence and arguments presented by the parties and I have decided to dismiss the petition because the subcontracting of the work of the entire bargaining unit is imminent and certain and no purpose would be served in conducting an election.

I. BACKGROUND AND FACTS

The Employer employs a total of approximately 35 to 40 employees at its Champaign, Illinois facility, with typically eight employees washing the tanks (trailers). All trailers washed in Champaign go to one client, A.C. Humko (aka ACH Food Companies). The Employer's agreement with A.C. Humko requires the tanks to be washed according to kosher standards including, for example, 190 degree water temperatures. The tank wash in Champaign operates 24 hours a day, over the course of three shifts, seven days a week.

Rusty Landes owns the Employer and his wife, Debbie, is its secretary treasurer. Marvin Wood is its operations manager. He works at the Employer's Jacksonville, Illinois facility. Kyle Woodworth, is the facility supervisor at Champaign, and he reports to Marvin Wood. Woodworth supervises the Champaign tank washers. Rusty and Debbie Landes and Marvin Wood testified for the Employer at the hearing. The Union did not present any witnesses.

³ In its brief, the Petitioner also raises, for the first time, the question of whether the anticipated temporary (Express Personnel) employees should be included in a unit with the Employer's employees, citing *Outokumpu Copper Franklin, Inc.*, 334 NLRB 263 (2001). I decline to consider this issue because it was neither raised nor fully litigated at the hearing and, in any event, unlike the employer in *Outokumpu Copper Franklin, Inc.*, as of the date of the hearing, the Employer did not employ any temporary employees. Moreover, the holding of *Outokumpu* no longer appears viable, as the Board, in deciding that case, relied on *M.B. Sturgis*, 331 NLRB 1298 (2000), which was subsequently overruled in *Oakwood Care Center*, 343 NLRB 659 (2004).

In late 2007, the Employer began negotiating a new contract with A.C. Humko. The previous contract was due to expire December 31, 2007. The parties reached a new agreement, but the rates for the Employer's tank washing services were not finalized until about January 21, 2008.

Operations Manager Marvin Wood testified that, because of some performance and turnover problems with its tank washers, the Employer began exploring the idea of subcontracting its tank wash operations in early 2006. Although Wood contacted a temporary agency, Express Personnel, in February 2006 to discuss subcontracting, the decision was made to not subcontract the work at that time in order to allow the Employer's managers the opportunity to improve the tank wash operations.

According to Wood, when the tank wash operations did not improve, he contacted Express Personnel again in about October 2007 to discuss subcontracting the work. Champaign Facility Supervisor Kyle Woodworth met with Express Personnel and as a result of this meeting Express Personnel sent the Employer a proposal for providing tank washers.

Marvin Wood and Kyle Woodworth again met with Express Personnel in Champaign on December 11, 2007. The parties discussed the details of the proposal such as Express Personnel's cost structure, how they would advertise for, screen, and hire tank washers. Express Personnel gave the Employer, among other things, a staffing agreement with its billing rate.

Marvin Wood met with Rusty and Debbie Landes on December 13, 2007 and discussed the proposed staffing agreement. Rusty Landes signed both the agreement and the billing rate and Wood sent both documents, along with a credit application, to Express Personnel that same day. Woods' cover letter said the Employer would like to "start up some time in 2008" and would contact Express Personnel "when it gets closer to that time."

Wood testified that in late January 2008, after the Employer received a January 21 e-mail from A.C. Humko specifying the tank truck rates to be in effect under the new contract, he

contacted Express Personnel and told them to proceed with hiring tank washers and that the Employer's target date was the end of February 2008. Express Personnel advised Wood that it had two applicants, but was waiting for their background checks to be completed. The Employer met with Express Personnel at its Champaign terminal again at the end of January to further discuss the tank washers' job description.

Although Kyle Wood, Rusty Landes, and Debbie Landes all testified that it was their plan for Express Personnel to provide the Employer a total of eight tank washers for the Champaign facility by the end of February 2008, they were less specific in responding to hypothetical questions about what the Employer would do if Express Personnel were unable to provide the requisite eight employees by that time. Rusty Landes testified that he did not foresee a problem because he had previously staffed the Champaign operations with tank washers in just 30 days, but if Express Personnel could not provide the tank washers by the end of February, he would continue to work with them into March and April. The Employer's witnesses also said that, because of turnover, they did not anticipate they would have many, if any, of their own employees working by the end of February, but if they did, they would fire them and consider referring them to Express Personnel, to see if it would hire them.

The documents and correspondence between the Employer and Express Personnel do not refer to a total number of employees to be provided or the Employer's "end of February" timetable. The Employer admitted that it never told its tank washers about its plan to fire them and subcontract their work and there is no evidence that the Employer told its client A.C. Humko, or any other customer or supplier that it planned to subcontract all the tank washing work by the end of February 2008.

II. ANALYSIS

The Board has held that it will not conduct an election at a time when a permanent layoff of the petitioned-for employees is imminent and certain. In *Hughes Aircraft Company*, 308 NLRB 82 (1992), the Board agreed with the Acting Regional Director's conclusion that the

union's petitions for units of plant protection officers and security receptionists should be dismissed because of the employer's imminent subcontracting of all uniformed plant protection officer work and security receptionist work. The Board agreed that the employer's conduct – mandating a reduction in operating costs, planning to reduce those costs by subcontracting the plant protection/security work, soliciting bids from subcontractors for the plant protection/security work, meeting with potential subcontractors to discuss specifications, signing agreements with the successful bidders, as well as keeping the current employees apprised of the employer's plans and of the time of their anticipated lay off – supported the employer's assertion that the permanent subcontracting of the work of the petitioned-for units was imminent and certain.

Similarly, in *Martin Marietta Aluminum*, 214 NLRB 646 (1974), the Board dismissed a petition for all production and maintenance employees because closure of the plant was "definite and imminent." The Board, in reversing the Regional Director's decision and direction of election, relied upon the employer's evidence that it had unsuccessfully sought a purchaser for the plant, announced the plant closure to the employees and the media, stopped taking orders for the plant, and notified utility companies and suppliers that it was terminating its contracts with them. The Board held that the Regional Director had erred in concluding that there was some chance of continuity of employment because he had relied on the plant manager's testimony in response to hypothetical questions as opposed to explicit testimony about the plant's prospect of a sale.

In *Larson Plywood Company*, 223 NLRB 1161 (1976), the Board again took up the issue of what constitutes sufficient evidence of an "imminent and certain" decision. In that case, the Board held that a corporate resolution to sell company assets within 90 days constituted an imminent and certain decision by the employer to close its two plants such that it would serve no useful purpose to conduct an election in a unit of all plant employees. The Board addressed the Regional Director's concern that the corporate resolution could not be "relied upon with absolute certainty," noting that there was no evidence of any inconsistent action on the part of the

employer nor was there any evidence that any employment relationship would survive the liquidation.⁴

Here, the evidence supports my conclusion that the Employer's subcontracting of tank washing work at its Champaign facility is imminent and certain. The Employer presented uncontradicted evidence that it had been engaged in discussions with Express Personnel to provide tank washers in late 2007 and that it signed an agreement with Express Personnel to do so on December 13, 2007. The unrebutted testimony of the Employer's witnesses establishes that it plans to have all eight of its Champaign tank washers employed by Express Personnel by the end of February and that the Employer discussed this timetable with Express Personnel at the end of January 2008. *Hughes Aircraft Company*, 308 NLRB 82 (1992); *Martin Marietta Aluminum*, 214 NLRB 646 (1974).⁵

Although Petitioner contends on brief that the subcontracting is purely speculative because the temporary agency will be unable to find eight qualified tank washers by the end of February, it presented no evidence that the Employer has taken any action inconsistent with its assertion that it expected Express Personnel would be providing all eight tank washers by the end of February. *Larson Plywood Company*, 223 NLRB 1161 (1976). Rusty Landes was asked several hypothetical questions about what he would do if Express Personnel could not provide eight tank washers by the end of February and he opined that he would continue to work with Express Personnel into March and April; however, this does not establish that the February

⁴ See also *Douglas Motors Corp.*, 128 NLRB 307 (1960) (involving a change in the bargaining unit as a result of a change in the employer's operations. The Board held that the employer's execution of contracts with subcontractors, *inter alia*, indicated with sufficient definiteness that a fundamental change in the nature of the employer's business operations, from production and warehousing to just warehousing, was in process and expected to be accomplished shortly; therefore, an election in the original petitioned for unit of production and warehousing employees would serve no useful purpose).

⁵ While it is true that, unlike the employers in *Hughes* and *Martin Marietta*, the Employer here did not initially publicize its subcontracting decision to its employees, customers, or suppliers, it had been engaged in contract negotiations with its only customer in Champaign, A.C. Humko, for, among other things, the rates to be paid for the tank washing work. Once the rates were finalized, the Employer went forward with its plan, telling Express Personnel to begin referring employees, at which time the Employer's subcontracting plan would necessarily become public.

timetable was speculative for as Landes testified, he had no reason to think the timetable was not achievable because he had previously staffed the Champaign tank wash operations in just 30 days. *Martin Marietta Aluminum*, 214 NLRB 646 (1974). The Petitioner has also not presented any evidence to establish that the Employer and the tank washers would have a continued employment relationship after February 2008. The Employer's testimony that it plans to terminate its tank washing employees by the end of February is un rebutted.

In light of the unrefuted evidence that the subcontracting of the tank wash operations at the Employer's Champaign facility is imminent and certain, it would serve no purpose to conduct an election in the petition-for unit and I am dismissing the petition.

III. CONCLUSIONS AND FINDINGS

Based upon the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.
3. The Petitioner claims to represent certain employees of the Employer.
4. No question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

IV. ORDER

The Petition filed in this matter is dismissed.⁶

⁶ However, to insure the employees' statutory rights to an election, should the Employer not in fact proceed with its plan to subcontract all the tank washing at the Champaign facility, I will upon proper motion by Petitioner reinstate the petition and direct an election. See *Larson Plywood Company*, 223 NLRB 1161 (1976).

V. E-FILING

The National Labor Relations Board has expanded the list of permissible documents that may be electronically filed with its offices. If a party wishes to file one of the documents which may now be filed electronically, please refer to the Attachment supplied with the Regional Office's initial correspondence for guidance in doing so. Guidance for E-filing can also be found on the National Labor Relations Board website at www.nlrb.gov. On the home page of the website, select the **E-Gov** tab and click on **E-Filing**. Then select the NLRB office for which you wish to E-file your documents. Detailed E-filing instructions explaining how to file the documents electronically will be displayed.

VI. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EST on **March 7, 2008**. The request may **not** be filed by facsimile.

Dated: February 22, 2008
at: St. Louis, MO

Ralph R. Tremain, Regional Director, R-14
National Labor Relations Board
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